Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-701.

ALEXANDER T. ARTHURS, M.D.,
PETITIONER,

v.

CHRIS O. STERN,
AS SHE IS EXECUTIVE SECRETARY OF THE
BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE OF THE
COMMONWEALTH OF MASSACHUSETTS,
AND
THE MEMBERS OF THE BOARD OF REGISTRATION
AND DISCIPLINE IN MEDICINE,
AND
THE DIVISION OF HEARING OFFICERS OF
SAID COMMONWEALTH,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner's Reply Brief.

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Questions Presented.

1. Has petitioner's case become moot where criminal charges remaining to be tried arise out of entirely different circumstances and events from the charges already disposed of?

2. Should the Court deny certiorari on grounds which the Court of Appeals specifically refused to consider and which, if accepted, go to the District Court's jurisdiction?

Argument.

I. The Case is Not Moot.

Respondents' brief in opposition to certiorari states (Bf. 3):

> "The criminal case which is finished charged the petitioner with issuing prescriptions for controlled substances under circumstances which violated M.G.L. c. 94C, § 19(a) (Pet. App. 2a). See Attachment A to this brief. This is the same conduct which prompted the board to commence disciplinary proceedings (Pet. App. 3a, n. 4). The indictments remaining to be tried contain conspiracy counts and do not add substance to the charges before the board. They are scheduled to go to trial in May, 1978. See Attachment B to this brief."

We may assume for purposes of this argument that if a person were indicted for conspiracy and on substantive charges arising out of the same conduct and testified at trial of the substantive charges, any burden on his Fifth Amendment right of silence at the later conspiracy trial would not rise to the level of a serious constitutional issue.[1] The fact

[1] We make this assumption, which may well be unsound, only in the interest of putting aside irrelevant considerations.

is that in the present case the conspiracy indictments arose out of allegations of entirely different conduct with different persons on different dates. Since respondents have printed a true copy of the conspiracy indictments in attachment B to their brief (pp. 4-7), we shall print as attachment A to this reply count I of the substantive indictment.[2] Even a superficial reading of the indictments will show that they charge such entirely different acts that a person might most reasonably choose to testify at the trial of the "substantive" indictment and remain silent at the trial of the conspiracy indictments. It is highly unlikely that one iota of petitioner's testimony at the trial of the substantive charges will be material or relevant to the conspiracy charges.

Respondents do not allege — nor could they — that the disciplinary charges before the Board of Registration and Discipline in Medicine (the board) do not involve the alleged conspiracy charges as well as the substantive charges. See opinion of Tauro, J., at p. 3a of the petition for writ of certiorari. Petitioner thus has a continuing interest in being permitted to demonstrate that the administrative hearing before the board should be continued until the conspiracy charges pending in the Superior Court are disposed of. The case is, therefore, not moot. *Uyeda* v. *Brooks*, 348 F. 2d 633, 635 (6th Cir. 1965).

We may note that it was petitioner who called to the attention of the Court of Appeals his acquittal on the substantive charges after oral argument, while the appeal was under advisement. The Court of Appeals noted the

[2] Counts II through VIII differ only in the name of the drug allegedly supplied and the date of the prescription. The "patient" in each of the counts was Thomas Jackson, alias Thomas Price, a State Police officer. Particulars supplied on the conspiracy indictments show entirely different dates of conduct and the conspiracy indictments themselves show entirely different names of patients. Petitioner was acquitted on counts I through VIII.

acquittal in its opinion (Pet. App. 23a). If the Court of Appeals had considered the case moot, it undoubtedly would on its motion have refused to consider the case on the merits. *Troy State University* v. *Dickey*, 402 F. 2d 515, 516 (5th Cir. 1968). Respondents for their part failed to raise any question of mootness when the case was before the Court of Appeals on a plenary record.

Even if the case were moot, mootness would hardly be ground for denying certiorari. On the contrary, we must assume that if this Court finds that the case has become moot, it will grant certiorari and vacate the judgments below with an order to dismiss the action as moot. Note, *Mootness on Appeal*, 83 Harv. L. Rev. 1672, 1681 (1970); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 78 (1955); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

II. It Would be Inappropriate to Deny Certiorari on Grounds that the District Court Ought to have Abstained or that the Case was Not Ripe for Adjudication.

Much of the briefs and almost all of the oral argument in the Court of Appeals centered on questions of ripeness and abstention which, as noted on p. 6 of the petition for writ of certiorari, the Court of Appeals refused to consider because they had not been raised in the District Court. If respondents believed that the Court of Appeals had erred in its refusal to rule on these points, they should have petitioned or cross-petitioned for writ of certiorari. Having failed to do so, they are in no position to attack the judgment.[3] *Peoria & Pekin Union Ry.* v. *United States*, 263 U.S. 528, 536 (1924); *Alaska Industrial Bd.* v. *Chugach Electric Assoc.*, 356 U.S. 320, 324-325 (1958); *Strunk* v. *United States*, 412 U.S. 434, 437 (1973).

We shall not attempt to meet respondents' arguments that the case was unripe for adjudication, that there was no case or controversy, and that the District Court ought to have abstained. If there were any merit to the arguments that the District Court lacked Article III jurisdiction, it would be the duty of this Court to vacate the judgment of the Court of Appeals and order the District Court to dismiss the action for want of jurisdiction. *Parker* v. *Ormsby*, 141 U.S. 81, 83 (1891), and cases cited. At the very least, the judgment of the Court of Appeals would be vacated and consideration of the issues raised by respondents would be ordered. Petitioner does not understand how respondents can ask this Court to leave standing a judgment on an important question of constitutional law decided by a federal court allegedly without jurisdiction.

On the other hand, it is a rare case where abstention can be raised for the first time on appeal. The abstention doctrine, which has already been criticized for the delay and the cost to litigants that it entails (see *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 196 [1959]), ought especially, if it is applicable, to be called to the

[3] This is not a case within the purview of *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924), where respondents seek merely to argue alternative grounds in support of the judgment of the lower court. Had the Court of Appeals determined that the District Court lac'ed jurisdiction or ought to have abstained from exercising jurisdiction, it would have avoided discussing the merits and ordered dismissal of the action for want of jurisdiction or a stay of proceedings in the District Court. Neither such order would have been entitled to *res judicata* or *stare decisis* effect on the merits of petitioner's claims. See and compare *Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

attention of the trial court. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964).

Section 63 of c. 112 of the Massachusetts General Laws is unambiguous and, therefore, even if there had been a timely request for abstention by the District Court, the request would properly have been denied. *Lindsey* v. *Normet*, 405 U.S. 56, 62 n. 5 (1972). But if this Court should determine after granting certiorari that abstention was appropriate for any reason, presumably it would, as it did in *Bellotti* v. *Baird*, 428 U.S. 132, 146-152 (1976), vacate the judgment of the Court of Appeals and order a stay of proceedings in the District Court while petitioner pursues whatever state remedies may be available. If the Court of Appeals has unnecessarily decided a question of federal constitutional law that could have been avoided by litigation in the state courts, it is highly undesirable from the viewpoint of federal public policy to allow that decision to stand and be given *res judicata* and *stare decisis* effect.

In short, petitioner does not agree that the action brought in the District Court did not present a case or controversy ripe for adjudication, nor does he believe that there was any basis for abstention. But even if he is in error on these points, the lack of jurisdiction or the need to abstain would militate in favor of this Court's exercise of the certiorari jurisdiction, not against it.

Conclusion.

A petition for writ of certiorari should be granted for the reasons stated in the original petition and should not

be denied for the new causes set forth in the brief in opposition.

Respectfully submitted,

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Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of March in the year of our Lord one thousand nine hundred and seventy-five

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Alexander T. Arthurs

on the eighth day of October in the year of our Lord one thousand nine hundred and seventy-four at Somerville, in the County of Middlesex, aforesaid, being a practitioner did issue a prescription for a controlled substance, to wit: Nembutal, Class B, containing a derivative of barbituric acid, said prescription not being issued for a legitimate medical purpose in the usual course of his professional practice.

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Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

"A"